U.S. Department of Labor

Office of Administrative Law Judges
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Date: October 17, 2000

Case No.: 2000-LHC-308

OWCP No.: 07-146958

In the Matter of:

JESSIE WILLIAMS,
Claimant

against

INGALLS SHIPBUILDING, INC.,
Employer

APPEARANCES:

MAGER VARNADO, ESQ.
On behalf of the Claimant

PAUL M. FRANKE, JR., ESQ.
On behalf of Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Worker's Compensation Act (hereinafter "the Act"), 33 U.S.C. § 901, et seq., brought by JESSIE WILLIAMS ("Claimant") against INGALLS SHIPBUILDING, INC. ("Employer") for injuries allegedly sustained during the construction of vessel components at Employer's shipyard adjoining the waters of the Gulf of Mexico in Pascagoula,

Mississippi.

The issues raised here could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held April 19, 2000 in Gulfport, Mississippi.

STIPULATIONS

Prior to the hearing, the parties agreed to a joint stipulation (JX-1):[1]

1. That the injury or accident occurred on January 6, 1998;

2. That the injury occurred in the Claimant's course and scope of employment;

3. That an employer/employee relationship existed between the Claimant and the Respondent at the time of the accident;

4. That Respondent/employer was timely advised of the injury;

5. That Respondent timely filed a Notice of Controversion;

6. Claimant's average weekly wage at the time of the accident was $571.70;

7. That compensation has been paid for temporary total disability from January 8, 1998 until January 10, 1998 and from January 26, 1998 until an unspecified date in the total amount of $18,838.71;

8. Medical benefits have been paid in a total amount to date of $17,343.70;

9. Claimant's date of Maximum Medical Improvement (MMI) was 3/25/99.

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[1] The following references will be used: TX for the official hearing transcript; JX-__ for Joint exhibits; CX-__ for the Claimant's exhibits; and RX-__ for Employer's exhibits.

ISSUES

The parties listed the following issues as disputed on the joint stipulation:

1. Nature and extent of the Claimant's disability;

2. Attorney's fees;

3. Employer's credit for compensation and wages paid;

4. Medical authorization;

5. Any unpaid compensation.

The parties also listed the following specific issues as unresolved:

1. Whether Claimant's psychological problems were causally related to his workplace injury;

2. The availability of suitable alternate employment for the Claimant;

3. The Respondent's liability for unpaid compensation;

4. Respondent's liability for medical expenses incurred for treatment by physicians whose services were not authorized;

5. Respondent's entitlement to relief under section 8(f) of the Act.

SUMMARY OF FACTS

I. Claimant's Employment and Injury

The evidence in this case reflects that the Claimant was employed by Respondent, Ingalls Shipbuilding, Inc. Claimant testified at trial that he worked for the Respondent at their shipyard. Claimant was hired by Respondent in April of 1974 and worked continuously from that date until the day of his accident. (TX, p. 15). At one point during his career, the Claimant advanced to the rank of work leaderman. (CX-6, p. 3). Claimant was also offered a position as a supervisor at the Respondent's

shipyard, but he refused that position. He testified that he thought it was too much for him. (CX-6, pp. 3-4). The Claimant testified in his deposition that he had not made a prior claim for worker's compensation or filed any lawsuits for personal injuries. (CX-6, p. 4)

The Claimant testified that he was injured at work in January of 1998. (TX, p. 16). At the time of his injury, Claimant was assigned to build a gas turbine foundation in the fabrication shop at Respondent's shipyard. (TX, p. 16). Claimant testified that he did not stop working immediately after injuring himself. Instead, he completed his shift. As he was putting up his tools at the end of the day, he told his supervisor that he thought he had injured himself. His supervisor told him to go to the yard hospital the following day. (TX, pp. 16-17).

Claimant subsequently sought a variety of medical treatments for his injuries. The progression of these is detailed below. After 12 months of medical treatment, he was released to return to work with permanent restrictions in January of 1999. (TX, p. 22). He returned to work at his regular position and was instructed not to exceed his limitations. (TX, p. 24). On the Claimant's second day back at work, he was assigned a project that required him to lift more than 40 pounds. (TX, p. 25). He testified that he never refused a job and that he completed that project. (TX, pp. 25-26). While working on the project, however, the Claimant testified that he re-injured himself. He further testified that at the end of that day he packed up his tools and went home. He admits that he never returned to work. (TX, p. 26). Claimant also testified that on his first day back at work he was given a number of small projects to work on and that he did not have any significant problems with completing these tasks. (TX, p. 25).

Claimant was repeatedly advised when he returned to work that he should not work outside his restrictions. According to his account of the day he returned to work, Claimant went to several different parts of the shipyard seeking light duty employment. No light duty positions were available. Claimant chose to return to his prior position with his restrictions. He understood that he was supposed to advise his supervisor if he was being asked to work outside his restrictions, or that he was supposed to ask for help. He did not do so. (TX, p. 25).

Respondent's policy required a medical excuse for any employee absence in excess of seven days. (C'S-6, p. 8). The Claimant was terminated for cause by the Respondent because he did not provided medical authorization for his absence after leaving work following his re-injury. (C'S-6, p. 8). The Claimant testified in his deposition that he did not file a grievance or appeal with the company over his termination. (C'S-6, p. 9). Claimant also indicated that he is not a member of the union that represents workers at Respondent's shipyard. (C'S-6, p. 9).

Since his termination from employment with the Respondent, Claimant has attempted to obtain other work. Claimant reports, however, that all of his applications at other employers were unsuccessful. (TX, p. 36). He has been out of work since walking off his job in January of 1999.

II. Medical Treatment

A. Physical Injury

Claimant was physically injured as a result of his accident on January 6, 1998. Employer provides no independent medical reports to demonstrate that the Claimant was not injured or that his injuries were not as serious as they appear.[2] The Court has no reason to believe that the Claimant was dishonest about his pain other than to exaggerate it so as to expedite treatment. Accordingly, the Court credits the Claimant's testimony and the evidence provided in the form of medical records from his treating physicians.

Dr. Smith

Claimant originally presented to the emergency department at Ocean Springs Hospital on the day after his injury for treatment. He testified at his deposition that the physicians at Ocean Springs recommended that he follow up with Dr. Howard Smith. Several days later he did so. (C'S-6, p. 6). The Claimant admits that he did not receive authorization from his employer to receive treatment from Dr. Smith under worker's compensation. (C'S-6, p. 6).

Dr. Smith originally evaluated the Claimant on January 26, 1998. His initial impression was that Claimant suffered from a Left S1 radiculopathy. (C'S-9, p.15). Dr. Smith then ordered an MRI and refilled the Claimant's medications while he confirmed the diagnosis.

Doctor Smith's diagnosis was confirmed by the MRI. (C'S-9, p. 13). He ordered an epidural steroid injection and sent the Claimant to Dr. Murphy for further treatment. (C'S-9, p. 13). The Claimant returned two weeks later and stated that he had not seen Dr. Murphy. He had, however, obtained the recommended injection. (C'S-9, p. 12). The Claimant indicated that the injection had completely removed his pain. (C'S-9, p. 12). On the basis of this visit, Dr. Smith cleared the Claimant to return to work. (C'S-9, p. 12).

On March 9, 1998, Claimant returned to Dr. Smith's care. He indicated that he was having continuing problems and that the epidural steroid injection was no longer helping to alleviate his pain. (C'S-9, p. 11). Dr. Smith ordered additional tests and agreed to see the patient in follow up. The report from the EMG and NCV tests Dr. Smith ordered indicate that the results of these tests are consistent with an L5-S1 radiculopathy on the left side. (C'S-9, p. 10). In response to this evaluation, Dr. Smith prescribed

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[2]Employer indirectly offers, however, documentary evidence that suggests that the Claimant may be exaggerating his pain from the injury. This evidence takes the form of Dr. Cole's psychological evaluation of the Claimant, which will be fully evaluated herein. (RX-10).

Elavil[3] for the Claimant and asked him to return in two weeks. (C'S-9, p. 9).

When the Claimant returned on April 3, 1998, he indicated that the Elavil made him tired. Doctor Smith agreed that the Claimant could not work in this condition. Doctor Smith also changed the Claimant's medication to Zoloft[4]. (C'S-9, p. 8). In the period between his April 3, 1998 appointment and his May 19, 1998 appointment with Dr. Smith, the Claimant had a severe problem with cholecystis and pancreatitis. (C'S-9, p. 7). These problems required him to have significant surgery and to discontinue using the medications that Dr. Smith had previously prescribed. (C'S-9, p. 7). Dr. Smith deferred to Claimant's surgeon for the choice of new medications to alleviate the pain from his existing injury.

On June 15, 1998, the Claimant returned to Dr. Smith for another visit. At this visit, the Claimant reported that he was continuing to have problems with pain and that he had developed complications from his surgery for pancreatitis. (C'S-9, p. 6). Doctor Smith was advised that the Claimant's worker's compensation had been terminated because Dr. Smith had returned him to work in February of 1998. Smith's notes indicate that this was an error and that he had taken the Claimant out of work again the same day. The Claimant was scheduled to return to Dr. Smith's care in four weeks. (C'S-9, p. 6).

At his July 13, 1998 appointment, Claimant reported that he was having even more severe pain in his back, with radiation down his left leg. He also indicated that he was having continuing problems with his gastro-intestinal disorder and was frequently ill when he ate. Doctor Smith recommended that the Claimant see Dr. Mollie Holtzman to determine whether she could assist with his pain. (C'S-9, p. 5). Following Dr. Holtzman's departure from the Mississippi Gulf Coast, Claimant returned to Dr. Smith and asked for an additional referral for continuing pain management. Doctor Smith recommended that the Claimant see Dr. Joe Chen for his complaints of pain. (C'S-9, p. 4).

Dr. Holtzman

The Claimant did seek permission from his worker's compensation insurance to receive treatment from Dr. Holtzman. In his deposition, Claimant explained that his worker's compensation case manager had approved his visit to Dr. Holtzman. (C'S-6, p. 6).

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[3]Elavil is amitriptyline Hcl, which is used to relieve the symptoms of depression. Physician's Desk Reference (PDR), 52 Ed., 1998.

[4]Zoloft is a selective serotonin reuptake inhibitor used for the treatment of depression. PDR, 52 Ed., 1988.

Doctor Mollie Holtzman[5] of Ocean Springs, MS. evaluated the Claimant on August 5, 1998. She agreed that the Claimant had a left S1 radiculopathy and that this, combined with relative inactivity and other medical problems, had lead to a decreased range of motion and deconditioning. (C'S-11, p. 10). Doctor Holtzman sent the Claimant to his family physician for treatment of his high blood pressure prior to beginning treatment of her own. She recommended that as soon as he resolved his high blood pressure problem he should undergo a physical therapy program. This program was to include stretching to improve range of motion, cardiovascular conditioning, and stabilization. Doctor Holtzman also opined that Claimant might benefit from a second epidural and that he should continue with an anti-inflammatory and Naprelan[6] for the pain. Finally, she prescribed Pamelor[7] as a substitute for the Elavil that he had previously taken.(C'S-11, p. 10).

Claimant returned to see Dr. Holtzman on August 26, 1998. At that time, he had completed six sessions of physical therapy and was scheduled to Dr. Laseter[8] for a caudal epidural. Her notes from this visit indicate that the Claimant still had not resolved his high blood pressure problem and that this was greatly limiting his physical therapy. She repeated her instructions to the Claimant that he needed to see his regular physician for treatment of his high blood pressure. (C'S-11, p. 8). Doctor Holtzman instructed the Claimant to continue with physical therapy and to have the epidural for pain control. She also switched him from Pamelor to Doxepin[9] for the relief of his pain at night.

Claimant continued with his course of physical therapy but appeared for only two visits between his August 26 appointment with Dr. Holtzman and his September 23 visit. He also had an epidural to alleviate the pain. Neither treatment provided the Claimant with any relief. Doctor Holtzman's[10] notes from this visit indicate that if the patient continued not to cooperate, she would have to release him from treatment

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[5]Dr. Holtzman's letterhead lists her as a board certified physiatrist.

[6]Naprelan is a non-steroidal anti-inflammatory drug used to treat arthritis and moderate pain. PDR, 52 Ed., 1998.

[7]Pamelor is a brand name for nortriptyline Hcl used to treat symptoms of depression. PDR, 52 Ed., 1998.

[8]Claimant's deposition testimony indicates that he received authorization from his worker's compensation case manager to see Dr. Laseter for this epidural. (CX-6, p. 7).

[9]Doxepin is a psychotherapeutic agent used to treat depression and other disorders. PDR, 52 Ed. 1998.

[10]The notes indicate that Claimant was actually seen by Dr. Stonnington, presumably a partner in practice with Dr. Holtzman or a resident at her clinic, but are jointly signed by Drs. Holtzman and Stonnington.

to return to work. (C'S-11, p. 7).

Doctor Holtzman next saw the Claimant on November 10, 1998. At that time, the Claimant had missed a number of physical therapy appointments because of hurricane damage to the physical therapy center and his home. His physical therapy had been further stifled by the fact that his high blood pressure was going untreated. The Claimant reported however, that he had received good relief from the previous epidural. Doctor Holtzman ordered another epidural to relieve the pain temporarily and facilitate continuing physical therapy. She also proposed a work conditioning program to facilitate the Claimant's return to his job. (C'S-11, p. 6).

On December 29, 1998, Dr. Holtzman reported that the Claimant had tolerated the work conditioning program well. She released him to return to work but required modified duty. Specifically, she restricted the Claimant from lifting more than 40 pounds, recommended altering static positions after 30 minutes, and limited his bending and squatting. (C'S-11, p. 5).

Almost a month after Dr. Holtzman cleared the Claimant to return to work with restrictions, he returned to her office. He reported that he had returned to work for two days and had then gone to the emergency room because he was in pain. Claimant also reported several falls which he said were caused by pressure in his left hip. Doctor Holtzman advised Claimant that he would feel some soreness upon returning to work, but that he needed to give it a bigger effort. She also advised him to tell his employer if he was being asked to work outside of his restrictions. Doctor Holtzman also gave the Claimant a series of trigger point injections along the bilateral lumbar paraspinals.[11] She cleared the Claimant to return to work with his previous restrictions. (C'S-11, p. 4).

Subsequent to this appointment, the Claimant missed several followup appointments with Dr. Holtzman. He then returned to her care on March 25, 1998 after almost three months away. He reported that he never returned to work after his January appointment and that he had been terminated from his job because he did not return. Doctor Holtzman noted that the Claimant was somewhat depressed and that he had voiced a non-specific suicidal ideation. Doctor Holtzman ultimately concluded that the Claimant was at Maximum Medical Improvement at this point and that he did not need further medications. She indicated that he would continue at the same status where she had previously released him and that he should follow up with her office as needed. (C'S-11, p. 1).

Dr. Chen

When Dr. Holtzman left the area and could no longer treat the Clamant, he returned to Dr. Smith and asked for a referral to another physician for assistance with his pain. Dr. Smith referred the Claimant to Dr. Joe Chen. The Claimant testified at his deposition that he received prior authorization from his

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[11]Dr. Holtzman reports that these injections were composed of 1 cc of 0.5% Marcaine.

worker's compensation case manager to treat with Dr. Chen. (C'S-6, p. 7).

After his first visit with the Claimant on September 3, 1999, Dr. Chen agreed with the other physician's assessment of his injury. (C'S-10, p. 7). He advised treating the Claimant using Celebrex and Ultram.[12] He also proposed a trial of an implanted spinal cord stimulator. (C'S-10, p. 7).

On September 27, 1999, Claimant returned to follow up with Dr. Chen. Claimant indicated that he wanted to try treatment using the spinal cord stimulator. Doctor Chen sent the Claimant to Dr. Jonathan Cole for a psychological evaluation in anticipation of the implantation of a spinal cord stimulator. (C'S-10, p. 5). The evidence indicates that worker's compensation approved this evaluation by Dr. Cole.(C'S-10, p. 4).

The spinal cord stimulator trial began on November 10, 1999 when Dr. Chen implanted the device into the Claimant. (C'S-10, p. 2). On December 7, 1999, Dr. Chen indicated that the trial had been successful and recommended the implantation of a permanent stimulator unit in the Claimant. He also agreed with Dr. Holtzman's prior assessment that the Claimant was at maximum medical improvement and that he would be subject to the permanent restrictions she imposed on the Claimant. Dr, Chen recommended the stimulator implant as a permanent pain management device and sent Claimant for a psychological evaluation with Dr. Cole. (C'S-10, p. 1).

The final record from Dr. Chen is his response to a letter sent to him by Tommy Sanders, the Claimant's vocational rehabilitation counselor. In response to this letter, Dr. Chen indicates that he has reviewed Mr. Sanders report of the modified job duties available to the Claimant. He indicates that on the basis of this review, he believes the duties are suitable for the Claimant. The letter was signed by Dr. Chen on March 28, 2000. (EX-6, p. 1).

B. Psychiatric Treatment

Dr. Cole

Doctor Cole saw the Claimant once for evaluation on December 20, 1999. He reviewed te Claimant's chart, interviewed the Claimant, and performed the following tests: (1) Minnesota Multiphasic Personality Inventory-2; (2) Multidimensional Pain Inventory; (3) Pain Disability Index; (4) Beck Depression Inventory; and, (5) Pain Anxiety Symptoms Scale. (EX-10, p. 1).

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[12]Ultram is a centrally acting analgesic used for management of moderate pain. PDR, 52 Ed., 1998.

Doctor Cole noted that the Claimant's history was significant for his history of trauma during his two tours of duty in Vietnam as well as recurrent nightmares, previous alcoholism, and anxiety attacks. (EX-10, p. 2). On the basis of his interview and testing, Dr. Cole concluded that the Claimant suffered from major depressive disorder, pain disorder with psychological factors and a general medical condition, and posttraumatic stress disorder. Dr. Cole also found that the Claimant was not a candidate for chronic narcotic therapy because of his tendency to take more pain medicine than prescribed. He referred Claimant to the Biloxi and Gulfport VA for medical treatment for his depression and posttraumatic stress disorder. (EX-10, pp. 3-4). Ultimately, it was Dr. Cole's opinion that the Claimant was not suitable for invasive pain management techniques. (EX-10, p. 4).

Doctor Cole also wrote a letter to the claims adjuster working on this case. In that letter, he opined that some of the Claimant's problems existed prior to his injury. This letter, written on March 23, 2000, also opined that after intensive therapy for his psychiatric problems, the Claimant was now a good candidate for the implantation of an electronic stimulator. (EX-10, pp. 5-6). Doctor Cole added at the end of his letter that the Claimant had reached maximum medical improvement with respect to his psychiatric disorders. He explained that the Claimant's pain disorder and his depression, both related to his injury at the shipyard, were adequately by Dr. Cole and the VA medical center. (EX-10, p. 5). Doctor Cole also declared that the Claimant's post-traumatic stress disorder, which was not related to his workplace injury, was adequately treated by the VA staff. (EX-10, p. 5). Based on these opinions, Dr. Cole opined that the Claimant had reached maximum medical improvement with respect to his psychiatric disorders. (EX-10, p. 5).

VAMC

The final medical records for the Claimant are those presented from his treatment with the Veterans Administration Medical Center in Biloxi. Claimant was signed into this facility for inpatient treatment for his depression on December 22, 1999. At the time, Claimant was clinically depressed and demonstrated suicidal ideations and thoughts of hurting his wife. (C'S-12, p. 267).

During his stay at the VA hospital, Claimant had the opportunity to talk with Dr. Jessica Brown, a psychology resident. During this conversation on December 27, 1999, he identified numerous factors that contributed to his depression. These included his loss of work, loss of family of origin, sexual dysfunction, and his children. (C'S-12, p. 263).

The Claimant was discharged from the psychiatric ward on January 21, 2000. He continued to receive treatment on an outpatient basis after this date. (C'S-12, pp. 258-259). It is clear from the medical records that the Claimant continues to have nightmares and that he has had suicidal ideations in the past. He admitted during one of his interviews with the staff at the VA hospital on December 22, 1999 that he had previously tried to kill himself. The details of that incident are not reported except to indicate that the Claimant had jumped into some water attempting to drown himself. He was apparently rescued by some of his friends. (C'S-12, p. 228).

DISCUSSION

I. Jurisdiction

This claim concerns an injury to the Claimant, Jessie Williams. At the time of the accident, Claimant was employed by the Respondent, Ingalls Shipbuilding, Inc. as a shipfitter. Claimant had worked for Respondent since 1974. The parties do not dispute that there was an employer/employee relationship between the Claimant and Respondent at the time of this accident. The parties also do not dispute that the January 6, 1998 accident occurred while the Claimant was in the course and scope of his employment. Finally, the accident occurred at the Respondent's shipyard adjacent to the navigable waters of the Gulf of Mexico in Pascagoula, MS. The Claimant is therefore covered by the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §901, et seq.. The parties do not dispute this determination of jurisdiction. (JX-1).

II. Claimant's Prima Facie Case

In order to receive compensation for his injuries, Claimant must prove that he suffered some harm or pain and that an accident occurred or working conditions existed which could have caused the harm. *See Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cr. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). Here there is no question that the Claimant suffered harm or pain. He was treated for more than one year for the injury to his back, and was unable to return to work because of the amount of pain he was in. Further, there is adequate evidence of an accident occurring at work to raise the presumption that the Claimant is entitled to compensation. No evidence is presented by Respondent to contradict the Claimant's assertion that he was hurt by this workplace accident.

Considering all of the evidence, this court finds that the Claimant suffered a left S1 radiculopathy as diagnosed originally by Dr. Smith. (C'S-9, p. 15). Claimant was treated for this injury by Drs. Smith, Holtzman, and Chen. He reached Maximum Medical Improvement on March 25, 1998. (C'S-11, p.1). As of that date, he was medically cleared to return to his regular position with the Respondent provided that he work within the permanent restrictions established by Dr. Holtzman. These restrictions included no lifting greater than 40 pounds, limited bending and squatting, and changing positions every 30 minutes. (C'S–11, p. 5).

With respect to the Claimant's psychological injuries, the court finds that they are related in part to his physical workplace injury. Counsel for the Respondent urges that the Claimant had preexisting psychological problems. Respondent's Counsel also asserts that the medical evidence does not draw a connection between the Claimant's current problems and his workplace injury. Instead, they argue, his depression stems from his service in Vietnam and the loss of his mother. (Resp. Brief, p. 4).

The court does not find Respondent's allegations to be accurate. Respondent's own evidence indicates that Claimant's psychological injury is related to his physical workplace injury. Respondent's exhibit 10 are the reports from Dr. Cole's psychological evaluation of the Claimant. In his March 23 letter, Dr. Cole states that "[i]t was my opinion that some of his depression and all of his post-traumatic stress disorder was due to factors which were pre-existing to his injury." (EX-10, p. 5). This statement supports our conclusion that some of the Claimant's depression was related to his injury at the shipyard and therefore is subject to worker's compensation.

In addition, Respondent's allegation that there is no connection drawn between the psychiatric problems and the physical injury are undercut by the records from the Biloxi VA medical Center. During Claimant's discussion with a resident at the VA, he indicated that a number of factors including the loss of his job and his children were causing his depression.(C'S-12, p. 263). Despite evidence of a previous suicide attempt and prior psychiatric trauma, the court finds that this statement

supports a conclusion that the Claimant's injury is work related. There is insufficient evidence presented by the Employer to rebut the presumption that the Claimant was injured or suffered pain because of an accident or conditions in his workplace. The Court therefore finds that the Claimant's psychiatric problems are subject to worker's compensation.

III. Nature and Extent of Disability

A. Psychiatric Injuries

The Court has found that the Claimant suffered psychiatric injuries as a result of his workplace accident. There is no evidence, however, to show that the Claimant's psychiatric problems have resulted in a permanent disability. None of the evidence regarding these problems indicate that they will prevent the Claimant from returning to work at his prior position or any other position. The vocational rehabilitation assessment prepared by Sanders and Associates for this Claimant does not even mention his psychiatric treatment as a consideration in finding suitable alternate employment for him. (RX-11). Based on the weight of this evidence, the court finds that the Claimant's psychiatric injuries, although work related, are neither temporarily nor permanently disabling.

B. Physical Injuries

Physical Disability

The Court finds that the Claimant is physically disabled as a result of his injuries. As a result of his accident the Claimant was unable to work from January 8, 1998 until January 10, 1998. He was also unable to work from January 26, 1998 until December 29, 1998 when Dr. Holtzman cleared him to return

to work. (C'S-11, p. 5). Claimant was therefore temporarily totally disabled during those periods and entitled to compensation.

The Court also finds that the Claimant's injuries resulted in the assignment of a 5% permanent partial disability rating. Doctor Holtzman assigned this rating when she determined that the Claimant had reached Maximum medical improvement. She stated in her final report that the Claimant received a 5% PPI for his chronic S1 radiculopathy on the left. (C'S-11, p. 1). Doctor Chen subsequently agreed with this assessment. (C'S-10, p. 1).

Availability of Alternative Employment

The second part of Claimant's case for permanent total disability is that there is no suitable alternative employment available to him given his restrictions. The court finds that this is not the case for two reasons.

First, the evidence indicates that Respondent offered Claimant the opportunity to return to his prior position and work within his permanent restrictions. In fact, the evidence indicates that Claimant briefly returned to work at the shipyard in that capacity. (TX, pp. 24-26). The case law is clear that where the Claimant is offered a position at his pre-injury wage, there is no loss of earning capacity. *See Swain v. Bath Iron Works*, 17 BRBS 145. In this case the Claimant was generously afforded the opportunity to return to his previous job at his previous wage. That he chose to leave the shipyard and never informed them of that choice does not amount to a loss of wage earning capacity related to his injury.

Case law also recognizes that a Claimant may be assigned to light duty work following an injury. That light duty work amounts to suitable alternate employment if, (1) the claimant is capable of performing it; (2) it is necessary to the employer; and, (3) it is profitable to the employer. *See Peele v. Newport News*, 20 BRBS 133 (1987); *Walker v. Sun Shipbuilding*, 19 BRBS 171 (1986). In this case the Respondent employer made every effort to find light duty work which the Claimant could perform and which would be necessary and profitable to the employer. The evidence reflects that although there were not specific light duty positions available, the Respondent did utilize Claimant's skills in his previous capacity with instructions not to exceed his limitations. (TX, pp. 24-26). Here again, we must find that suitable alternate employment was available to the Claimant.

Second, the evidence indicates that other positions were available in the local area and that Claimant was capable of performing them. Both parties offer the reports of Mr. Sanders, a Vocational Rehabilitation Consultant. Mr. Sanders performed a labor market survey on behalf of the Claimant and determined that a number of other positions as a security guard, cashier, or engine mechanic were available after the Claimant reached maximum medical improvement. (C'S-7, pp. 1-3). Mr. Sanders also evaluated the work that was available to the Claimant at Respondent's yard had he not been terminated. He determined that it was possible for the claimant to return to work in this position without violating his permanent restrictions. (EX-11, pp. 8-9). Based on this evidence, the court finds that there was suitable

employment available for the Claimant. He therefore is not permanently disabled.

IV. Unpaid Compensation

Claimant alleges that Respondent is liable to him for unpaid compensation. The parties have stipulated to the periods for which the Claimant was entitled to temporary total disability. (JX-1). The court finds that the Claimant is not permanently disabled, and therefore is not entitled to further compensation. Accordingly, Respondent has no liability to the Claimant beyond the compensation he has already received and the cost of his medical treatment.

V. Medical Authorization

Respondent's counsel argues that the employer should not be liable to Claimant for his medical expenses because he did not seek prior authorization to see various physicians. Specifically, Respondent cites § 7(c)(2) of the Act which provides that an employee may not change doctors after

his initial choice without permission from the employer or District Director. *See* 33 U.S.C. § 907(c)(2). The regulations covering this section dictate that authorization shall be given when the Claimant's initial choice of physician was not a specialist whose services are necessary to proper care of this injury. *See* 20 C.F.R. § 702.406.

Respondent contends that in this case, the medical treatment rendered by the VA should not be covered because it was not authorized by the employer. This assertion on the part of respondent may be technically true. There is no evidence in the record to tell us whether the Claimant requested authorization from the Employer or Carrier to receive medical treatment from the VA medical center. The evidence does, however, support the conclusion that the Claimant originally sought treatment for his psychiatric disorder on an emergency basis.

Claimant first appeared at the walk-in mental health clinic at the VA medical center at the recommendation of Dr. Cole. (C'S-12, p. 267). Based upon his initial evaluation at the clinic, Claimant was referred to the mental health ward at the VA medical center. When he presented to the facility he was severely depressed and reported that he had contemplated suicide as recently as the night before. The medical staff indicated that he had a viable suicide plan involving a gun and that he thought the insurance money would assist his family. (C'S-12, pp. 267-268). These statements caused the medical staff to admit Claimant for further psychiatric care. The court, therefore concludes that the Claimant justifiably sought treatment for his psychiatric problems on an emergency basis. His admission to the VA hospital was a continuation of his emergency treatment.

Taken from this perspective, the Court finds that it is entirely reasonable to compensate the

Claimant for his admission to the VA hospital. In an emergency situation, with his life in jeopardy, a Claimant should not be forced to seek authorization prior to seeking medical reasonable medical treatment. It does not matter whether the Claimant's life is threatened by someone or something else or by his own device.

Following his discharge from the VA, however, the Claimant continued to seek treatment from the VA hospital on an outpatient basis. The court finds that this treatment was not sought on an emergency basis. Once released from the VA hospital, Claimant had the opportunity to seek approval from his Employer to receive further treatment. The Claimant's failure to do so necessarily means that he cannot be reimbursed for his expenses.

The court also believes that, even if the Claimant should have sought approval from Employer prior to receiving care at the VA hospital his condition made him unable to do so. The medical evidence reflects that Claimant was severely depressed. He contemplated killing himself. He even went so far as to develop a plan. In that state of mind the court finds that the Claimant could not reasonably have been expected to seek authorization.

VI. 8(f) Relief

Respondent asserts a claim for relief under section 8(f) of the Act. The District Director has filed a motion to dismiss this claim on the basis that the claim is untimely. Additionally, Respondent's brief states that the Employer has adequately proven the availability of suitable alternate employment for the Claimant and that Claimant therefore has suffered no loss of wage earning capacity. The court has already found that this is the case. Accordingly, the court does not need to consider the question of relief under 8(f).

ORDER

1. Employer shall pay Claimant compensation for temporary total disability from January 8 through 10, 1998 and from January 26, 1998 until December 29, 1998, the date at which Claimant could return to work. Compensation shall be paid based on the stipulated average weekly wage of $571.70 and in accordance with section 8(b) of the Act. 33 U.S.C. § 908(b);

2. Employer is entitled to credit for any compensation paid to the Claimant for the above noted periods;

3. Employer shall pay for or reimburse Claimant for all necessary and reasonable medical care and treatment related to Claimant's work-related injury and aggravations. This award includes treatment for Claimant's resulting psychiatric treatment at the Biloxi VAMC to the extent that such treatment was given

on an in patient or emergency basis;

4. Employer shall pay Claimant interest on any accrued unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the last auction of 52 week United States Treasury Bills as of the date this Decision and Order is filed with the District Director;

5. Claimant's counsel, Mager Varnado, shall have 20 days from receipt of this Order in which to file an attorney fee petition and simultaneously serve a copy of the petition on opposing counsel. Thereafter, Employer shall have 20 days from receipt of the fee petitions in which to respond to the petitions.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge

RDM/ct